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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 IN RE: OPTICAL DISK DRIVE PRODUCTS)
ANTITRUST LITIGATION)

MDL Docket No. M:10-2143 VRW

Date: June 24, 2010

Time: 10:00 a.m.

Court: Hon. Vaughn R. Walker

14 This Document Relates to All Cases.
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18 **UNITED STATES' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR A**
19 **LIMITED STAY OF DISCOVERY**
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1 **I. Introduction**

2 In an effort to prevent interference with a closely related criminal antitrust investigation,
3 the United States seeks a limited stay of discovery in the above-captioned matter. The limited
4 stay would remain in effect for one year, at which time the government would report to the Court
5 on the status of the grand jury investigation. The government expects that the proposed stay
6 would be lifted as to document discovery after one year and that full discovery would commence
7 sometime thereafter, as permitted by the Court. The government also seeks to stay discovery
8 relating to grand jury proceedings and communications with the government for the duration of
9 the grand jury investigation and any resulting criminal trials.

10 Contrary to Direct Purchaser Plaintiffs' contention in their Opposition that the stay the
11 government seeks is of "unnecessary breadth" (*See* Direct Purchaser Plaintiffs' Memo of Points
12 & Authorities in Opp'n ("Directs' Opp.") at 1, Doc. #90), the stay requested by the government
13 is limited in scope, narrowly tailored, and within the range of the stays entered by other courts in
14 this District. Moreover, the position taken by Direct Purchaser Plaintiffs in advocating no stay at
15 all is at odds with the position taken by the government, Defendants, and Indirect Purchasers. To
16 be sure, Indirect Purchasers seek a more narrow stay than that advocated by the government, but
17 Indirect Purchasers recognize that a stay of some sort is appropriate under the circumstances.¹
18 *See* Plaintiff Wagner's Response to United States' Motion ("Indirect's Rsp.") at 2-3, Doc. #88.

19 The government's proposed stay seeks to limit the impact on civil litigants while
20 protecting the public's interest in preserving the integrity of the grand jury. The proposed stay
21 deals with three distinct areas of discovery: document discovery; testimonial discovery, *e.g.*,
22 depositions and interrogatories; and discovery related to grand jury proceedings and

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24 ¹Prior to the filing of the government's Reply, the Court issued an Order appointing the
25 Hagens Berman firm as interim class counsel for the indirect purchaser plaintiffs. *See* Order
26 Appointing Interim Class Counsel for Indirect Purchasers (June 4, 2010), Doc. #96. Before this
27 Order, two other firms vying for the interim class counsel position filed papers responsive to the
28 government's motion for a stay. *See* Doc. #87, #90. For purposes of its Reply, the government
has focused on Direct Purchaser Plaintiff's Opposition (Doc. #90) and the Hagens Berman
Response filed on behalf of Indirect Purchaser Aaron Wagner (Doc. #88).

communications with the government. *See generally* USA's Proposed Order, Doc. #68-2. In attempting to limit the impact on Plaintiffs, the proposed stay also provides for wide swaths of discovery that can commence immediately, subject to the Federal Rules of Civil Procedure ("FRCP") and any other directive of this Court. *Id.*

II. Argument

A. Direct Purchasers' Position Demanding That No Stay Be Issued Is Extreme

1. Direct Purchasers' Are Outliers Among the Participants in This Litigation

Of the four parties to this matter, only the Direct Purchasers are advocating the position that the Court should issue no stay in this matter. That position is at odds with their fellow plaintiffs who advocate a stay on some depositions and on some communications with the government, and is clearly at odds with the government's and the Defendants' position vis-a-vis a stay.

Indirect Purchasers oppose the stay proposed by the government, but acknowledge that a stay is appropriate for the following categories of discovery:

- (a) "**No depositions** may be taken" (except depositions of Defendants' customers and suppliers). *See* Indirect's Proposed Order at ¶ 5, Doc. #88-1 (emphasis added);
- (b) There is no prohibition on "the service of **interrogatories, requests for admissions, requests for production of documents and deposition notices.**" However, "to the extent that such discovery requires the production or responses to such discovery **it is hereby stayed for a period of twelve months** from the filing of the consolidated complaint." *Id.* at ¶ 7 (emphasis added); and
- (c) "**No questions** may be asked at any deposition **about the grand jury proceedings or the witness' testimony, if any, before the grand jury or communications with the United States**

relating to the grand jury proceedings.” *Id.* at ¶ 5 (emphasis added).

Indirect Purchasers’ proposed stay does not address all of the concerns raised by the government, but, unlike Direct Purchasers’ position, Indirect Purchasers’ proposal is more measured and calibrated in light of both the circumstances of this case and similar cases litigated in the Northern District.

2. Direct Purchasers’ Position on a Stay Is an Outlier in the Northern District

Direct Purchasers’ position demanding that no stay be issued is at odds with every antitrust case in the Northern District of California in which the Antitrust Division of the Department of Justice has sought a stay of discovery since 2004. In the four cases in which the Division has sought a discovery stay, the court has granted the government’s request at least in part: the dynamic random access memory (“DRAM”), static random access memory (“SRAM”), liquid crystal display (“TFT-LCD”), and cathode ray tube (“CRT”) civil cases. *See* USA’s Memo of P&A, Exhibits 1 - 4, Doc. #68-1.

As discussed in the government’s opening brief, in DRAM and SRAM, orders were entered that stayed interrogatory and deposition discovery (the DRAM order stayed discovery until completion of the grand jury investigation). *Id.* at 3. In the two most recent cases, the stays that have been entered have been more expansive. In TFT-LCD, the stay that was entered covered virtually all discovery for an indefinite period of time. *Id.* In its Order, the Court also scheduled a discovery status conference to be held eight months later. *Id.* In the CRT matter, a stipulated stay was approved by the Court that again stayed virtually all merits discovery for an initial six-month period. *Id.* at 3-4. The CRT stay has subsequently been extended, with document discovery being stayed for approximately eighteen months. *Id.* The CRT stay also foreclosed discovery relating to grand jury proceedings and communications with the government for the “pendency of the grand jury proceedings and any resulting criminal trials.” *See id.*, Exhibit 4, Doc. #68-1 (*In re: CRT Antitrust Litigation*, No. CV-0705944 -SC (N.D. Cal.), Stipulation and Order to Extend Limited Discovery Stay (January 5, 2010), at 2.).

Each provision of the government's proposed stay, including the time period, falls within the parameters of at least one of the stays entered in the four matters discussed above. The proposed stay, based on the unique facts of this case, sets a stay of document discovery, per TFT-LCD and CRT, a stay of depositions and interrogatories, per DRAM, SRAM, TFT-LCD, and CRT, and a stay on discovery relating to grand jury proceedings and communications with the government, per DRAM, TFT-LCD and CRT.

B. The Requested Stay Is Carefully Limited in Scope and Duration Based on the Facts and Circumstances of This Case

Courts look to the "particular circumstances and competing interests involved in the case" to determine whether to grant a stay. *Federal Savings and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). The government follows this same principle when determining whether to seek a stay and, if so, the terms of the proposed stay.

Direct Purchaser Plaintiffs claim that the "DOJ sets forth a boilerplate recitation . . . of adverse consequences," and characterize the concerns about civil discovery raised by the government as "misplaced, speculative and unfounded." See Direct's Opp. at 1. Plaintiffs make this statement with full knowledge that the government has submitted an under-seal declaration in support of its motion to the Court. The government has stated a factual basis for its request for a limited stay in the Under Seal Declaration of Sidney A. Majalya ("Majalya Decl."). See Majalya Decl. Doc. #98. The facts elucidated in the Majalya Declaration bear directly on the harms about which the government is concerned. See Majalya Decl. at ¶¶ 15-25. For the reasons explained in the Majalya Declaration, the government is proposing a twelve-month stay on what is essentially "merits-related" discovery.² See Majalya Decl. While this request is unique to the

²Indirect Purchasers argue that the period of the government's proposed stay is "indefinite" and the Court should deny the stay on that basis. See Indirect's Rsp. at 5. However, the proposed stay is no more indefinite than that ordered by Judge Illston in TFT-LCD. See Exhibit 3 to USA's Memo of P&A, Doc. #68-1 (*In re: TFT-LCD Antitrust Litigation*, No. M-07-1827 SI (N.D. Cal.), Order Granting United States' Motion to Stay Discovery (September 25, 2007), at 2. (Order staying virtually all discovery "[u]ntil further order of the Court.")).

1 facts of this case, similar stays have been entered in the DRAM, SRAM, TFT-LCD, and CRT
2 civil cases. *See* USA's Memo of P&A, Exhibits 1 - 4, Doc. #68-1.

3 The stay proposed by the government here is most analogous to the stay stipulated to by
4 the parties and entered by the Court in CRT.³ The length of the requested stay is longer than that
5 originally requested in CRT. However, the length of the requested stay closely tracks what has
6 actually happened in the CRT matter. The parties in CRT have stipulated to no fewer than three
7 extensions and, in doing so, have stayed discovery (to varying degrees) for a period approaching
8 24 months (with document discovery being stayed for a total of eighteen months). *Id.* at Exhibit
9 4. In addition, language in the proposed stay relating to the prohibition on discovery relating to
10 grand jury proceedings and communications with the government comes directly from the
11 stipulated stay in CRT. *Id.* The parties there agreed to forgo discovery of such communications.
12 Plaintiffs have not articulated any rationale as to why they stipulated to a stay on discovery of
13 such communications in the CRT matter, but cannot do so here. The government, consistent
14 with its position in CRT, believes that these categories of discovery are potentially damaging to
15 the government's ability to prosecute cases effectively, are unnecessary for the effective
16 prosecution of the civil litigation, and should be off limits.

17 The stay proposed by the government specifically includes "translations produced to the
18 United States" as part of the definition of "communications with the United States." *See*
19 [Proposed] Order Granting the United States' Motion for a Limited Stay of Discovery (Doc. #68-
20 2). This explicit reference to translations follows Judge Illston's Order in the TFT-LCD civil
21 cases, holding that translations produced to the government fall within the definition of
22 "communications with the United States." *See In re: TFT-LCD Antitrust Litigation*, No. CV-07-
23 1827-SI (N.D. Cal.), Order Granting in Part and Denying in Part Direct Plaintiffs' Objections to

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26 ³Many of the counsel representing plaintiffs in this civil litigation represent plaintiffs in
27 the CRT civil litigation and are signatories to the stipulation to stay discovery there, including
28 lead counsel for Direct Purchaser Plaintiffs, Saveri & Saveri Inc.

1 Special Master's Report and Recommendation Regarding Translations; Adopting Report and
 2 Recommendation (January 21, 2010) (Doc. #1493).

3 **C. Direct Purchaser Plaintiffs Fail To Give Any Weight to What Should Be a**
 4 **Critical Factor in Deciding Whether To Issue a Stay**

5 Under the fifth *Molinaro* factor, a critical factor in deciding whether to issue a stay is the
 6 interest in protecting the criminal investigation. *See Molinaro*, 889 F.2d at 903. Plaintiffs fail to
 7 give any weight to the public's interest in effective criminal enforcement. As stated in the
 8 government's opening brief, the DOJ's and the public's interest in a stay are twofold: "(1) to
 9 ensure that the liberal discovery laws under civil cases are not improperly used for criminal
 10 discovery; and (2) to ensure that information gathered by the government and presented to the
 11 grand jury is not disclosed." *See* USA's Memo of P&A at 7. In fact, the interest of the
 12 government in protecting its criminal investigation should be afforded great weight. *See*
 13 *Bureerong v. Uvawas*, 167 F.R.D. 83, 86-87 (C.D. Cal. 1996). In light of that, and the well-
 14 established principle that it is in the public interest that prosecution of a criminal case is entitled
 15 to precedence over the rights of civil litigants when application of liberal discovery rules would
 16 circumvent the more limited rules of criminal discovery, a limited stay of discovery is justified.
 17 *See Osband v. Woodford*, 290 F.3d 1036, 1042-43 (9th Cir. 2002) (quoting *McSurely v.*
 18 *McClellan*, 426 F.2d 664, 671-72 (D.C. Cir. 1970) ("[C]ivil discovery may not be used to subvert
 19 limitations on discovery in criminal cases, either by the government or by private parties.");
 20 *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) ("A litigant should not be allowed to
 21 make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the
 22 restrictions on criminal discovery and thereby obtain documents he would not otherwise be
 23 entitled to for use in his criminal suit.").

24 Direct Purchaser Plaintiffs brush aside the government's concerns and state summarily
 25 that prosecution of the civil case will not hinder the DOJ's investigation. *See* Direct's Opp. at
 26 18. The government's concern that liberal civil discovery rules will be used to circumvent the
 27 criminal discovery rules is not a "hypothetical parade of horrors." *Id.* Plaintiffs know full well

1 that the full discovery requirements under the FRCP would result in Defendants receiving
2 documents and other information from codefendants that have a direct bearing on the criminal
3 investigation. Assuming the Defendants in question are subjects of the criminal investigation,
4 they would reap the benefits of civil discovery at the expense of the government's criminal
5 investigation. Under the Federal Rules of Criminal Procedure, subjects of the investigation
6 would not be entitled to any discovery pre-indictment. *See* Fed. R. Crim P. 16. Furthermore,
7 depositions are not generally permitted under the criminal rules even after indictment. To the
8 extent any Defendant is permitted to take depositions in the civil case that bear on the criminal
9 investigation, that Defendant would be receiving a benefit not permitted to them under the
10 criminal rules. A limited stay of discovery would, for the time being, prevent Defendants from
11 taking civil discovery and would permit the government to push its criminal case forward.

12 It is purely speculative to assume, as Plaintiffs do, that Defendants are already sharing
13 documents and other information (*See* Direct's Opp. at 18), but it is a certainty that Defendants
14 will get each other's documents and other information through civil discovery. Defendants have
15 interests that vary. Some will no doubt enter into joint defense agreements, but others may wish
16 to cooperate with the government. Cooperators, in an effort to get the most benefit from their
17 cooperation, would likely decline to share documents with their fellow Defendants, opting
18 instead to offer the documents to the government as part of their cooperation.

19 **D. A Criminal Conviction Would Aid Plaintiffs**

20 Direct Purchaser Plaintiffs argue that "tethering" the civil case to the criminal case in this
21 matter is unfair. *See* Direct's Opp. at 12. This argument is fundamentally flawed, given the fact
22 that the cases brought by Plaintiffs postdate and, in fact, stem directly from the grand jury
23 investigation looking into anticompetitive activity in the optical disk drive market. Regardless, it
24 is undeniable that a criminal conviction, whether reached by plea agreements or trial, would
25 benefit civil plaintiffs. Granted, the grounds upon which a defendant's conviction stand might be
26 narrower than the allegations in a civil suit, but, as to the portions of the case that are in parallel,
27 civil plaintiffs would not have to prove liability.

1 **E. Discovery Relating to Overseas Documents**

2 Direct Purchaser Plaintiffs argue that they have the ability, through discovery, to obtain
 3 documents outside the United States and therefore outside the government's subpoena power.
 4 *See* Direct's Opp. at 14. Regardless of the reach of Plaintiffs' civil discovery powers, the
 5 government's requested stay would cover discovery outside the United States. The government
 6 believes that documents and other evidence relevant to its investigation do exist outside the
 7 United States. The government's interest in preventing premature discovery from moving
 8 forward on evidence outside the United States is as compelling as the case for documents inside
 9 the United States. In fact, given the nature of international cartel cases, evidence located outside
 10 the United States is often more important than evidence located within the United States.

11 **F. Civil Discovery Threatens the Integrity of the Grand Jury**

12 Were the Court to adopt the position advocated by Direct Purchaser Plaintiffs regarding a
 13 stay, the integrity of the grand jury process would be threatened. The probability of Plaintiffs and
 14 Defendants deposing witnesses and asking questions that go to the heart of what the grand jury is
 15 investigating is quite high. *See* Majalya Declaration at ¶ 38. Witnesses could be asked a range of
 16 questions that could reveal whom the grand jury is targeting and what questions the grand jury
 17 has been asking certain witnesses. The requested stay would prevent these types of inquiries and
 18 would serve to protect the grand jury process. Plaintiffs have articulated no reason why such
 19 questioning should not be foreclosed, given that questions relating to the substance of what any
 20 particular witness actually knows or has personally done are perfectly acceptable.

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28 United States' Reply
 M:10-2143 VRW

1 **III. Conclusion**

2 For the foregoing reasons and the reasons stated in the United States' previous filings
3 relating to its Motion for a Limited Stay of Discovery, the United States respectfully requests that
4 the Court order a limited stay of discovery as specified in the Proposed Order (Doc. #68-2), to be
5 followed by staged discovery on a schedule to be determined pending a progress report by the
6 United States to the Court.

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8 Dated: June 10, 2010

Respectfully submitted,

9
10 /s/ Sidney A. Majalya
11 Sidney A. Majalya
12 Attorney, San Francisco Office
13 Antitrust Division
14 U.S. Department of Justice
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CERTIFICATE OF SERVICE

I, Liliana C. Vallejo, certify:

That I am a citizen of the United States and employed by the United States Department of Justice, Antitrust Division, at 450 Golden Gate Avenue, Room 10-0101, San Francisco, California 94102; I am over the age of eighteen years; and I am not a party to the within action.

That, on June 10, 2010, I electronically filed with the Clerk of the United States District Court, Northern District of California, using its ECF system, the following documents:

United States' Reply to Plaintiffs' Opposition to Motion for a Limited Stay of Discovery.

Under N.D. Cal. Local Rule General Order 45, all parties appearing in this matter will receive an electronic copy of said filed documents.

I declare under penalty of perjury, under the laws of the United States of America, that the above is true and correct.

Executed on June 10, 2010 at San Francisco, California.

/s/ Liliana C. Vallejo
Liliana C. Vallejo